Supreme Court, U.S.
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No. 91-1931

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STEVEN H. LAWRENCE,
Petitioner,

v.

MARS INCORPORATED,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals properly determined that Petitioner failed to produce sufficient evidence at trial to raise an inference that his discharge was motivated by religious discrimination.

LISTING OF PARTIES AND CORPORATE AFFILIATION

The caption of the case in this Court contains the names of all parties.

Pursuant to Rule 29.1, Respondent Mars, Incorporated states that it is a privately held company which has no parent company, subsidiaries or affiliated entities which are not wholly owned.

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent Mars, Incorporated respectfully requests that the petition for certiorari filed by Steven H. Lawrence be denied.

STATEMENT OF FACTS

The facts of the case are set forth in detail in the opinion of the Court of Appeals. (Pet. App. at 2a-6a). However, the Petitioner's Statement of "Undisputed Facts of Record" contains numerous assertions and characterizations of fact which were not conceded by Mars and which were not adopted by the lower courts. For purposes of clarification, Mars offers the following supplemental statement.

A. Lawrence's Request for Religious Leave in 1988

Mars has a long-standing policy under which associate (employee) requests to take paid leave for religious observance are automatically granted. (J.A. 419-21).[1] Mars honored every request for leave for religious observance made by Lawrence during the entire term of his employment. (J.A. 196). This included paid leave to observe the Jewish holidays of Rosh Hashanah and Yom Kippur in 1986, 1987 and 1988. (J.A. 195-97). Lawrence contends that his 1988 request for leave was "presented orally to Forrest Mars," one of the Company's co-presidents, and that this was a departure from the usual practice. (Pet. at 7, 17). However, the record evidence demonstrates that Forrest Mars was consulted for the limited purpose of providing Lawrence with a prompt response to his question concerning additional options for paid leave. (J.A. 744-45). The result of this consultation was that Lawrence was notified of an additional leave option, the "holiday in lieu", under which an employee may take leave without using a vacation day or a floating holiday by working on a regularly scheduled holiday. (J.A. 160, 161, 494).[2]

B. Lawrence's Job Duties and Mars' Internal Policies

Lawrence's recitation of his qualifications in risk management never addresses the fact that he was discharged for failing to perform a job duty that he himself described as "integral" to his position. In

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[1] "J.A." references are to the Joint Appendix filed in the Court of Appeals. "Pet. App." references are to the appendix filed with the Petition.

[2] Lawrence further misstates the involvement of the Mars' co-presidents by contending that the statement allegedly made by Jacques Geurts, that the only excuse for being absent during McLean Weeks is "if you are dead and even that is not a good excuse" (J.A. 162), could be interpreted as "a veiled threat from the Office of the President." (Pet. at 17, n.6.) Mr. Geurts' rebuttal of Lawrence's testimony is not in the trial record because Lawrence did not call him as a witness during his case in chief. In any event, there is no evidence that anyone at Mars asked Geurts to speak to Lawrence concerning his absences, nor is there any evidence that Geurts discussed Lawrence's absences with anyone at Mars. (J.A. 198-99).

a written job description of the Risk Manager position, Lawrence stated that he had "daily contact with insurance brokers (consultants) and insurance company representatives" and that "[t]hese worldwide relationships are both complex and important, as they are an integral key to providing technical consulting services." (J.A. 321). Lawrence further recognized that his job required:

> [e]xcellent communications skills across all levels of management — upward, downward, laterally. Must possess excellent interpersonal skills and be a persuasive communicator ... .

(J.A. 320).

Lawrence's failure to maintain an effective business relationship with Johnson & Higgins, Mars' primary insurance broker, led directly to his termination. On October 26, 1988 Johnson & Higgins' Vice-President Richard Duncan met with Robert DeMaria, Lawrence's immediate supervisor at Mars, and presented a list of complaints about Lawrence outlined in detail in a three-page handwritten memorandum. (J.A. 562).[3]

The memorandum listed five categories of problems with Lawrence: 1) his adversarial and uncooperative attitude towards Johnson & Higgins representatives; 2) the adverse effect Lawrence's antagonistic attitude had on Johnson & Higgins' role as broker for Mars; 3) Lawrence's abuse of expenses; 4) his negative impact on the morale of the team which serviced Mars' account; and 5) his personal abuse of a Johnson & Higgins account executive,

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[3] In his Petition, Lawrence incorrectly contends that no evidence concerning the October 26, 1988 meeting was presented to the district court at trial and that defendant offered no evidence at trial. (Pet. at 8, n.2). Under the local rules, exhibits are presented prior to trial and are admitted unless objected to. *See* Rule 13(B) of the United States District Court Rules for the Eastern District of Virginia. Duncan's memorandum outlining the concerns he presented to DeMaria was included as an exhibit by both parties. Further, DeMaria prepared a memorandum, which accompanied Lawrence's exit interview form, memorializing the information received from brokers and vendors and outlining the grounds for Lawrence's termination. DeMaria's memorandum was also included as an exhibit by both parties. (J.A. 362, 567).

Phyllis Flack. (J.A. 562). Duncan's notes reflect that employees and outside vendors who worked with Lawrence described him as "constantly adversarial", "unforgiving about ordinary 'small' mistakes", "socially unpleasant", and "never complimentary, always critical". (J.A. 562). Duncan's memorandum indicated that the firm intended to withdraw Ms. Flack from the account rather than subject her to Lawrence's "continued abuse." (J.A. 564).

Lawrence also mischaracterizes Mars' termination procedure in contending that he was entitled to pre-termination counseling and that his termination was a departure from Mars' usual policy. (Pet. at 7, 17 n.6). The actual Mars policy description does not require counseling in all instances, but rather states that pre-termination counseling "is used unless the problem is so serious as to preclude resolution of the difficulty." (J.A. 336). Mars deemed Lawrence's disruption of its world-wide risk management program to present a problem of such seriousness that discharge was warranted. (*Id.*).

C. Proceedings in the District Court

Lawrence's sole contention at trial was that he was fired because he took leave on the Jewish High Holidays during McLean Weeks. (J.A. 129). Lawrence testified on his own behalf. None of Lawrence's remaining witnesses had any direct involvement with or knowledge of the events which led to Lawrence's termination. (J.A. 21, 36, 44). None of the Mars associates who made the decision to terminate Lawrence's employment was called to testify, and Lawrence presented no evidence concerning the motivation of those who made the termination decision. Nor did Lawrence call as witnesses any of the Johnson & Higgins representatives who complained about him.

Lawrence admitted that he had no direct evidence that his absence for the High Holidays in September 1988 was the reason for his discharge. (J.A. 222). He testified that his case was entirely inferential, based upon his perception that he was performing well, his prior merit increases and feedback from DeMaria, his own opinion that "no one could be absent from McLean Weeks," and the alleged remark by Geurts. (J.A. 222).

At the conclusion of Lawrence's case the court granted Mars' motion to dismiss under Fed. R. Civ. P. 41(b). The Court found that Lawrence had not presented sufficient facts from which an inference of discrimination could properly be drawn. (J.A. 229-30). The Court reviewed the evidence presented at trial, including Lawrence's history of leave for religious observance, the absence of any prior disputes over his leave, and the specific reasons given to Lawrence for his termination. (J.A. 230-32). The Court found Lawrence's reliance on the alleged statement by Geurts to be insufficient to carry Lawrence's burden because Geurts had no responsibility for the supervision of Lawrence and no involvement with his termination. (J.A. 231). In addition, the Court found that Lawrence had not presented a *prima facie* case because he failed to establish that he was performing to his employer's expectations or that he was replaced by someone outside the protected group. (*Id.*).

D. Proceedings in the Court of Appeals

The Court of Appeals held that the district court did not err in granting the Rule 41(b) motion. For Lawrence to establish a *prima facie* case of discriminatory discharge, the Court held that he must, "*inter alia*, 1) prove that his job performance was satisfactory, and 2) present direct or indirect evidence whose cumulative probative force supports a reasonable inference that his discharge was discriminatory." (Pet. App. 6a).

The Court held that Lawrence's evidence was inadequate to satisfy either of these burdens. (Pet. App. at 6a). The Court concluded that Lawrence did not present sufficient evidence, direct or indirect, from which a trier of fact could infer religious discrimination, observing that:

> At trial, [Lawrence] did little more than show that a lawyer employed by Mars in Europe had in a joking manner criticized him for having missed a portion of "McLean Weeks", and that he had been fired within two months of his observance of religious holidays in September of 1988. These facts are insufficient for

> the trier of fact to have reasonably inferred that Lawrence's discharge was the result of religious discrimination.

(*Id.*).

The Court of Appeals further held that the sequence of proof in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), was properly applied to Lawrence's religious discrimination claim and that Lawrence's reliance on the scheme of proof for establishing retaliation under Title VII was misplaced. (Pet. App. 7a). The Court found that Lawrence could not have prevailed under the retaliation standard in any event, however, because he did not show a causal connection between his religious observance and his discharge. (*Id.*, n.2).

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals is correct and is not in conflict with the decisions of any other circuit. The issues presented for review involve reconsideration of factual matters which have twice been thoroughly canvassed by the lower courts and decided in favor of Mars. Lawrence's claims, while of great importance to the parties, involve highly individualized facts which have no impact outside the confines of this litigation. Because this case presents only issues concerning the sufficiency of the evidence and was correctly decided, there is no occasion for further review.

A. Issues Involving the Prima Facie Case Do Not Merit Review Because the Case Was Tried on the Merits and Decided Based Upon a Lack of Evidence.

There is no reason for this Court to grant *certiorari* to consider Lawrence's arguments that he established a *prima facie* case. That issue ceased to be relevant once the trial on the merits took place. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67-68 (1986); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-15 (1983). The operative question became whether there was sufficient

proof to raise an inference of discrimination. In granting the Rule 41(b) motion, the district court addressed the ultimate issue of discrimination *vel non* and found that there was no evidence sufficient to raise an inference that discrimination had taken place; at that stage the issue was no longer one of a *prima facie* case but whether Mars had intentionally discriminated against Lawrence. *See Aikens*, 460 U.S. at 715; *Holmes v. Bevilacqua*, 794 F.2d 142, 148 (4th Cir. 1986).

The disposition of the case under Fed. R. Civ. P. 41(b) does not alter this analysis. Judgment may be entered under Rule 41(b) even if the plaintiff established a *prima facie* case. *Holmes v. Bevilacqua*, 794 F.2d at 147. So long as there is evidence in the record of the defendant's non-discriminatory reason for the challenged action, the plaintiff had notice of the reasons and an opportunity to rebut them, and the plaintiff's evidence fails to demonstrate that the reasons are pretextual, a Rule 41(b) disposition is appropriate, and it is unnecessary for the court to determine if a *prima facie* case has been established. *Mitchell v. Baldridge*, 759 F.2d 80, 84 n.2, 87 (D.C. Cir. 1985); *Skillern v. Bolger*, 725 F.2d 1121, 1122 n.3 (7th Cir.), *cert. denied*, 469 U.S. 835 (1984); *Holden v. Commission Against Discrimination of the Commonwealth of Massachusetts*, 671 F.2d 30, 36 (1st Cir.), *cert. denied*, 459 U.S. 843 (1982).

These conditions were more than satisfied in this case. When the district court granted Mars' motion, it had before it Lawrence's testimony and that of the other witnesses in his case in chief, the pretrial order and the parties' proposed findings, the depositions of John and Forrest Mars, and Mars' and Lawrence's trial exhibits. Lawrence testified about the specific reasons advanced for his discharge both on direct and cross-examination and identified his written response, prepared on the day of his termination, to Mars' stated reasons for his discharge. The district court therefore had before it, through the testimony and exhibits, evidence of Mars' legitimate, non-discriminatory reasons for Lawrence's dismissal. Lawrence had notice of the reasons on the occasion of his termination and through Mars' motion for summary judgment as well as at trial; he had full opportunity to rebut them in his case in chief. *See Holden*, 671 F.2d at 36 (memo explaining reasons for discharge and cross-examination of the plaintiff gave plaintiff ample notice of

defendants' reasons). The court was therefore in a position to move beyond the *prima facie* case and reach the ultimate issue: whether Lawrence met his burden of proving that Mars intentionally discriminated against him.

The district court concluded that Lawrence's case rested on little more than the statement attributed to Mr. Geurts, who was admittedly neither Lawrence's supervisor nor a participant in the decision to discharge him. The district court's assessment that this evidence was inadequate to carry Lawrence's burden of proof was without error and was properly affirmed by the court of appeals. Consequently, in its present posture this case presents only issues relating to the sufficiency of the evidence. Those issues have already been resolved by both lower courts in favor of Mars. This Court has stated that it does not "grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). Yet a third review of the facts of this case is exactly what the Petitioner seeks. A grant of certiorari would simply be a license for Lawrence to rehash the evidence already found wanting by the lower courts.

B. The Decision Below is Not in Conflict with the Decisions of Any Other Court of Appeals.

1. Lawrence's arguments regarding the *prima facie* case do not merit review because the decision on the merits rendered the issue irrelevant. Still less do Lawrence's assertions of a conflict merit this Court's attention. The assertion of a conflict with the decisions of other circuit courts is spurious.

None of the decisions which Lawrence cites stands for the proposition that it is erroneous for a court to consider a plaintiff's performance at the time of discharge when assessing whether the second prong of the *McDonnell-Douglas* test is satisfied. *Lynn v. Regents of the Univ. of California*, 656 F.2d 1337 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982), was not a discharge case at all but concerned the showing necessary to establish the qualifications element in a case alleging disparate treatment in promotion and denial of tenure. In *Legrand v. Trustees of University of Arkansas at*

Pine Bluff, 821 F.2d 478, 481 (8th Cir. 1987), *cert. denied*, 485 U.S. 1034 (1988), the court found the second prong of the *McDonnell-Douglas* test satisfied where the plaintiffs demonstrated not only objective qualifications but "adduced evidence through employee evaluations that they satisfied the normal requirements of the job *prior to their dismissal*." (Emphasis supplied). In *Hybert v. Hearst Corp.*, 900 F.2d 1050, 1054 (7th Cir. 1990), the court declined to consider the question of the *prima facie* case at all because the issue no longer mattered after a trial on the merits.

Moreover, the standard which Lawrence criticizes — a focus on performance at the time of discharge — is eminently rational. The Fourth Circuit expressed the basis for this interpretation of the *McDonnell-Douglas* standard in *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 244 (4th Cir. 1982):

> We think it is important to hold employee-claimants in discharge, demotion, reassignment and like cases to the burden of showing that performance at the requisite level of employer expectations continued to a time reasonably close to the time of the challenged employer action. The presumption [created by the prima facie case] is rationally supportable only to the extent this is done, since the effect is to create a mandatory inference . . . that with performance established as satisfactory, there is no reasonable explanation for the challenged action but . . . discrimination.

In contrast, the "minimal qualifications" standard urged by Lawrence is not logical when it is applied to an incumbent employee who may well have the basic qualifications for the job but nonetheless is performing inadequately. The *McDonnell-Douglas* presumption is not rationally supportable in that instance because reasonable explanations for the discharge or demotion, i.e., the employee's actual performance, have not been eliminated.[4]

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[4] Lawrence's purported distinction between objective and subjective evidence of performance, even if legitimate, does not advance his case because of the undisputed evidence of the complaints about Lawrence from Johnson & Higgins and other insurance brokers.

2. Although Lawrence does not raise the issue as a separate question presented for review, he nonetheless argues in the petition that the Court of Appeals decision is in conflict with decisions of other circuits because it applied the wrong standard in reviewing his claims of religious bias. Rather than the *McDonnell-Douglas* analysis, Lawrence claims that the standard used by the Fourth Circuit to analyze retaliation cases should be applied. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985).

What Lawrence perceives to be a conflict is in reality a reasoned distinction between two independent theories of recovery in religious discrimination cases under Title VII. In cases alleging failure to accommodate an employee's religious observance or practice, brought under Section 701(j) of Title VII, the courts of appeals have applied a *prima facie* standard which requires a plaintiff to show: 1) a *bona fide* belief that conflicts with an employment requirement; 2) that he has informed his employer about the conflict; and 3) that an adverse personnel action was taken because of his refusal to comply with the employment requirement. *See, e.g., Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1486 (10th Cir. 1989), *cert. denied*, 495 U.S. 948 (1990); *Proctor v. Consolidated Freightways*, 795 F.2d 1472 (9th Cir. 1986); *Turpen v. Missouri Kansas Texas Ry.*, 736 F.2d 1022, 1026 (5th Cir. 1984). In contrast, where the issue is not failure to accommodate but a claim of adverse treatment based on religion or religious practices, other courts of appeals are in harmony with the Fourth Circuit in applying the *McDonnell-Douglas* analysis. *See, e.g., Bishena v. Marriott Corp.*, 959 F.2d 239 (9th Cir. 1992); (unpub'd opinion, text in 1992 WESTLAW); *Meiri v. Dacon*, 759 F.2d 989, 995 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985).

This is not an accommodation case. All of Lawrence's requests for accommodation of his religious practices were honored, and Mars never took the position that Lawrence's absences caused undue hardship. The Fourth Circuit's application of the *McDonnell-Douglas* analysis was both consistent with the legal standards applied in other circuits and manifestly correct.

Even if the standard which Lawrence advocates were the appropriate one in his case, it would not advance his cause. The Court of Appeals specifically found that Lawrence would not have prevailed under this standard because he failed to show a causal connection between his religious observances and the termination of his employment. Lawrence's contention in the petition that his evidence on this point was adequate once again goes to the sufficiency of the evidence and presents no question meriting review by this Court.

C. The Case Was Correctly Decided Below.

Lawrence's tactic throughout this litigation has been to attempt to obscure the profound factual weaknesses in his case by raising claims of technical error in assessing the burden of proof. This effort to cloud the real issue — whether there was sufficient proof that Lawrence was discharged because he took leave for religious observance — was rejected by the lower courts and should be rejected here.

Lawrence admitted that he had no direct evidence of discrimination. He was therefore required to present indirect or circumstantial evidence of sufficiently probative force to create an inference of discrimination. *Holmes v. Bevilacqua*, 794 F.2d at 146; *Lovelace v. Sherwin-Williams Co.*, 681 F.2d at 242. He failed to do this either through circumstantial evidence or by means of the judicially-created scheme of proof permitted by *McDonnell-Douglas*. Lawrence presented not a shred of evidence suggestive of unlawful motivation on the part of the Mars associates who decided to discharge him. His evidence of religious discrimination consisted of an alleged offhand comment by a Mars attorney who neither supervised Lawrence nor participated in the decision to discharge him. This evidence, coupled with Lawrence's discharge nearly two months after his 1988 leave, was entirely too flimsy to carry Lawrence's burden of proof.

The argument in the petition that the Court of Appeals' decision may be construed as requiring direct evidence of discrimination to establish a *prima facie* case is both factually insupportable and directly contrary to the language of the opinion below. The Court of

Appeals stated that Lawrence must "present direct or ***indirect*** evidence whose cumulative probative force supports a reasonable inference that his discharge was discriminatory." (Pet. App. 6a, emphasis supplied). The decision of the Court of Appeals rested upon its finding of a failure of direct *or* indirect proof, not upon a misapplication of the appropriate legal standard.[5]

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[5] Lawrence suggests that this case be joined with a completely unrelated action under the Age Discrimination in Employment Act, *E.E.O.C. v. Clay Printing Co.*, 955 F.2d 936 (4th Cir. 1992). Lawrence's contention that these decisions are indicative of a "pattern" in the Fourth Circuit of requiring direct evidence of discrimination (Pet. at 19) is completely rebutted by the fact that in ***this*** case, the Court did no such thing. As noted above, it stated just the opposite. Moreover, the request for consolidation with *Clay Printing* appears to be premised on an assumption that both decisions restrict the role of the finder of fact in discrimination cases. (Pet. at 19-20). This argument is inexplicable in the context of this case, which was *tried* by the finder of fact. *Clay Printing* was an appeal from a grant of summary judgment and was therefore reviewed under a different standard than this case. Identical or closely related issues which would warrant consolidation of this action with *Clay Printing* are completely absent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: July 2, 1992

CERTIFICATE OF SERVICE

I, Christine H. Perdue, Counsel for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari in the United States Mail, first class postage prepaid, this 2nd day of July, 1992, addressed to: David L. Rose, Esquire, 1835 K Street, N.W., Suite 900, Washington, D.C., 20006-1203.

Christine H. Perdue
Counsel for Respondents

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